KEVIN C. KEHOE

IBLA 91-32 Decided MAY 16, 1991

Appeal from a decision of the South Umpqua, Oregon, Resource Area Manager, Bureau of Land Management, setting rental rate for waterline right-of-way OR 45453.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   A right-of-way grant for a water pipeline issued in 1990 pursuant to regulations published at 43 CFR Part 2800, implementing the Federal Land Policy and Management Act of 1976, was made subject to payment of rental under 43 CFR 2803.1-2(a).

APPEARANCES: Kevin C. Kehoe, Tiller, Oregon, pro se; Joseph Ross, Acting Area Manager, South Umpqua Resource Area, Roseburg, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Kevin C. Kehoe has appealed from a September 19, 1990, decision by the South Umpqua, Oregon, Resource Area Manager, Bureau of Land Management (BLM), setting initial rental for water pipeline right-of-way OR 45453 pursuant to 43 CFR Subpart 2803. The September 19, 1990, decision from which appeal was taken stated, pertinently, that "rental due to initiate the grant is $58.00. The rent will cover the term of October 1990 thru December 31, 1994. Thereafter rental will be due on January 1, and will be for a five year term."

In his statement of reasons, appellant asserts that:

> I'm appealing the rental rate decision on my water line right-of-way. The reason for my appeal is that the BLM has a right-of-way through my property (SW 1/4 SW 1/4, T. 30 S., R. 2 W, W.M.) and does not pay a rental fee. The BLM right-of-way comprises approx. 2 ac. Therefore, in the interests of equal justice, I should not have to pay a rental fee for the water line right-of-way.

In answer to the argument that no rental should be assessed because BLM has obtained the benefit of a similar right-of-way at appellant's expense, BLM explains:

> The BLM right-of-way referred to in the statement of reasons is a perpetual exclusive road easement. The easement was acquired pursuant to the Act of July 26, 1955 (69 Stat. 375). The grantor of the easement, Mr. John Westphal, a predecessor in interest to Mr. Kehoe, was fully compensated for the easement. * * * The rental amount required by our decision of September 19, 1990, was calculated according to 43 CFR 2803 rental regulations. The reciprocal grant and rental waiver regulations, found at 43 CFR 2801.1 and 2803.1-2(b) respectively, are not applicable to the proposed land use or the applicant, Mr. Kehoe.

[1] Implementing section 504 of the Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(g) (1988), Departmental regulation 43 CFR 2803.1-2(a) provides, pertinently, that a "holder of a right-of-way grant * * * shall pay * * * fair market rental value [for the grant]." Sub-section (b)(1) of the regulation provides for exceptions to the requirement that rental be paid for rights-of-way, including rights-of-way for water pipelines. Appellant has not shown, however, that he is entitled to claim the benefit of any of the exceptions listed in the regulation. As BLM has indicated, there is a provision for exchange of rights-of-way in certain situations provided by 43 CFR 2801.1-2. The situation described by that regulation, where the United States seeks a road right-of-way across lands controlled by a person who is also coincidentally an applicant for a right-of-way grant from the United States, does not have any apparent bearing on the instant case, where the United States already held a road easement across appellant's land that the record indicates was granted in 1963. Appellant, therefore, has not shown that his right-of-way grant was made during a time when he was in a position "to grant the United States an equivalent right-of-way that is adequate in duration and rights." Id. In fact, it appears that the road right-of-way to which he refers was owned by the United States for nearly 30 years before he applied for his waterline right-of-way across Federal land.

Unless a right-of-way grantee shows error in a decision requiring payment of rental pursuant to FLPMA, the decision will be affirmed on appeal. Denver & Rio Grande Western Railroad Co., 101 IBLA 252, 254 (1988). While appellant argues that it is inequitable to require him to pay rental for his waterline right-of-way, he has not shown why this is so. An appellant must point to specific error to support an appeal before the Department. Keith P. Carpenter, 112 IBLA 101, 102 (1989). It is not enough that there be an allegation of error in a decision under review: it must be shown how a decision is in error if an appellant is to prevail. Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (1990). Inasmuch as appellant has not shown how the decision setting rental was made in error and has failed to establish that he is entitled to an exemption from the general requirement of law that Federal rights-of-way holders pay rent, we conclude that BLM correctly established the rental rate required to be paid in the instant case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge